Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations Of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	

COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

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The United States Telecom Association ("USTA"),[1] submits its comments through the undersigned and pursuant to the Federal Communications Commission's ("FCC's or Commission's") Notice of Proposed Rulemaking[2] ("NPRM") in the above-referenced proceeding. In the NPRM, the Commission seeks further comment on alternative unbundling rules consistent with section 251(c)(3) of the Communications Act of 1934, as amended ("the Act")[3] and in light of the U.S. Court of Appeals for the District of Columbia Circuit's ("D.C. Circuit") decision in *United States Telecom Ass'n v. FCC* ("*USTA II*").[4]

INTRODUCTION AND SUMMARY

The Commission initiates this NPRM in response to the D.C. Circuit's remand and vacatur in *USTA II*, seeking comment on unbundling rules that are consistent with the decision.

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[1] USTA is the Nation's oldest trade organization for the local exchange carrier industry. USTA's carrier members provide a full array of voice, data and video services over wireline and wireless networks.

[2] *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 69 Fed. Reg. 55128 (2004) ("NPRM").

[3] 47 U.S.C. § 251(c)(3).

Further, the Commission seeks comment on its "comprehensive twelve-month plan consisting of two phases to stabilize the market."[5]

This latest NPRM is now the fourth time that the FCC has attempted to implement a lawful unbundling strategy under the Act. The courts have invalidated the FCC's approach three times in the past eight years. Yet, each of these court rulings has provided the FCC with clear guidance regarding what would constitute lawful unbundling rules under sections 251(c)(3) and 251(d)(2). As a whole, these decisions require the FCC to take into account real competition in various markets and to compel unbundling only where competitors cannot compete without access to certain incumbent local exchange carrier ("ILEC") facilities. It should be absolutely clear now that the Commission is required to follow the guidance of the courts in order to create lawful unbundling rules.

In following the clear guidance of the courts and the Act itself, the Commission must adhere to three key principles. First, the FCC must implement rules that advance facilities-based competition. Second, the rules adopted must be narrowly tailored because to impose unbundling where it is not needed would impose heavy social costs and would actually harm competition. Third, and equally importantly, the Commission's rules must provide certainty. For too long the telecommunications industry has been operating under a cloud of uncertainty. Those making investments in networks need to know what regulatory structure will be applied to them.

In determining what network elements should be unbundled, the Act requires that "the Commission shall consider, at a minimum, whether . . . the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to

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[4] 359 F.3d 554 (D.C. Cir. 2004) (USTA II), *pets. for certiorari filed*, Nos. 04-12, 04-15, 04-18 (June 30, 2004).

provide the services that it seeks to offer."[6] In accord with the Act, the FCC must develop a meaningful impairment framework that addresses intermodal competition, specifically considering telephone service provided by cable, wireless, and voice over Internet protocol providers. The FCC must also apply limiting standards based on geography and product types. Again, these are considerations the FCC must undertake in order to address the D.C. Circuit's concerns regarding previous impairment analysis undertaken or directed by the Commission.

Keeping in mind these broad impairment considerations, the FCC must acknowledge that a competitive market for switching and high-capacity services exists. Real competition in the markets for these services exists without the use of unbundled network elements ("UNEs"). Today, competitive providers are using their own or alternative facilities to provide switching and high-capacity services and they are taking advantage of ILEC special access services to extend their reach for high-capacity facilities. Similarly, the FCC must develop unbundling rules that promote facilities-based competition, rather than the synthetic competition occurring by the use of UNE-P. To ensure the effectiveness of the FCC's new rules, the FCC must be clear in directing the states that its unbundling strategy precludes any state from passing rules thwarting the federal strategy for advancing competition and reducing regulation.

Finally, the Commission should create new rules that are effective immediately. This would negate the FCC's proposed requirement for a comprehensive twelve month transitional plan.

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[5] NPRM at 1.
[6] 47 U.S.C. § 251(d)(2)(B).

DISCUSSION

I. The Courts Have Provided Clear Guidance To Direct The FCC In A UNE Impairment Analysis That Will Comply With Section 251(d)(2) Of The 1996 Act.

In the past five years, the courts have issued three opinions invalidating FCC orders on its rulemakings on UNEs. Those opinions provide clear direction as to what the Commission must do in considering whether to require the unbundling of network elements to comply with the impairment standards of section 251(d)(2) of the Act. The FCC's past attempts to conduct the proper unbundling analysis have resulted in the Commission's unbundling rules being both vacated and remanded. After three failed attempts to provide the appropriate analysis, it is absolutely critical that the FCC now adhere to the courts' guidance as to what network elements should be unbundled and where they should be unbundled.

In *Iowa Utilities Board*,[7] the Supreme Court vacated the FCC's Rule 319,[8] which stated the network elements that ILECs were required to unbundle, finding that the "FCC did not adequately consider the 'necessary and impair' standards when it gave blanket access to these network elements, and others."[9] The Supreme Court further found that the 1996 Act required the "[. . . FCC to apply *some* limiting standard, rationally related to the goals of the Act . . . .]"[10] Notably, the Supreme Court added that the FCC "cannot, consistent with the statute, blind itself

[7] *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (Iowa Utils. Bd).

[8] 47 CFR §51.319 (1997).

[9] *Iowa Utils. Bd*. at 387.

[10] *Id*. at 386.

to the availability of elements outside the incumbents' network."[11] As a result of its analysis, the Supreme Court concluded that the FCC failed to conduct any impairment analysis.

In *USTA I*,[12] the D.C. Circuit remanded the FCC's unbundling rules, which were promulgated in the *UNE Remand Order*[13] following the Supreme Court's earlier *vacatur* of the FCC's first set of rules. Although the FCC attempted to apply an impairment analysis in its *UNE Remand Order*, the Court of Appeals dismissed as inaccurate some of the FCC's reasons – certainty in the marketplace; administrative practicality; and reduced regulation – for adopting, for the most part, undifferentiated national UNE rules.[14] More importantly, the FCC's other reasons – rapid introduction of competition and promotion of facilities-based competition, investment, and innovation – were also dismissed because the Court of Appeals found that the FCC had not demonstrated that the synthetic competition of services provided over ubiquitously provided ILEC facilities was the type of competition that would fulfill Congress's purposes and because the FCC's real reasoning essentially boiled down to a belief that the more unbundling the better.[15] The Court of Appeals concluded that the FCC "must point to something a bit more concrete than its belief in the beneficence of the widest unbundling possible," particularly that the absence of UNEs would genuinely impair competition.[16] Further, relying on the Supreme Court's finding in *Iowa Utilities Board* that "if 'Congress had wanted to give blanket access to

[11] *Id*. at 389.

[12] *See USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003) (*USTA I*).

[13] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) (*UNE Remand Order*).

[14] *USTA I* at 423.

[15] *Id*. at 424-425.

[16] *Id*. at 425.

incumbents' networks,' it 'would simply have said (as the Commission in effect has) that whatever requested element can be provided must be provided,'" the Court of Appeals added that it "read the statute as requiring a more nuanced concept of impairment than is reflected in findings such as the Commission's – detached from any specific markets or market categories."[17]

Finally, in *USTA II*,[18] the D.C. Circuit vacated the FCC's "sub delegation to state commissions of decision-making authority over impairment determinations, the nationwide impairment determinations with respect to . . . [certain] elements [*i.e.*, mass market switches, DS1s, DS3s, and dark fiber], the decision not to take into account availability of tariffed special access services when conducting the impairment analysis, and the decision that wireless carriers were impaired without unbundled access to ILECs [sic] dedicated transport."[19] The Court of Appeals' holdings in *USTA II* are more fully discussed later in these comments.

Not only have the courts' directions been clear when the matter of unbundling is directly at issue, but the Supreme Court has also provided guidance when considering the separate matter of the pricing methodology that applies to UNEs. In *Verizon*,[20] the Supreme Court acknowledged that "entrants may need to share some facilities that are very expensive to duplicate (say, loop elements) in order to be able to compete in other, more sensibly duplicable elements (say, digital switches or signal-multiplexing technology)."[21] Indeed, the Supreme Court plainly implies that access to network elements on an unbundled basis is limited. Where a

[17] *Id*. at 425-426 (*quoting Iowa Utils. Bd.*, 525 U.S. at 390).

[18] *See USTA II*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*).

[19] *Id*. at 554.

[20] *See Verizon Communications v. FCC*, 535 U.S. 467 (2002).

[21] *Id*. at 510 n.27.

network element is not "costly-to-duplicate" or "unnecessarily expensive," unbundled access to that element is not required.[22]

With such clear and consistent direction from the courts, the FCC is obligated to act accordingly and require unbundling only where the absence of unbundling will prevent entry by economically efficient competitors. In doing so the Commission must also be cognizant that unnecessary unbundling imposes heavy social costs and retards the development of facilities-based competition.

II. The *USTA II* Decision Requires The FCC To Change Its Impairment Framework To Comply With Section 251(d)(2) Of The Act.

In *USTA II*, the D.C Circuit noted several errors in the FCC's provisional impairment findings. In particular, the Commission failed to properly define markets and neglected to consider the widespread deployment of alternative facilities by both intermodal and intramodal competitors. The Court also reversed the Commission's decision to permit wireless providers to use UNEs, in light of overwhelming evidence that wireless providers are flourishing without such access (wireless customer growth has been remarkable and prices have been steadily declining), while simultaneously admonishing the FCC to give due account to intermodal competition in all unbundling determinations. Pursuant to section 251(d)(2), the Commission should correct the above noted deficiencies in its impairment analyses.

Congress made impairment the "touchstone" of the FCC's inquiry into unbundling;[23] without finding impairment, the FCC cannot allow unbundling.[24] The FCC cannot disregard the

[22] *Id*.

[23] *USTA I*, 290 F.3d at 415.

[24] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388-89, 391-92, 397 (1999).

D.C. Circuit's emphatic finding that, in many markets around the country, intermodal competitors such as wireless, cable telephony and VoIP providers can and currently do compete without mass-market switching. In addition, when creating a new impairment standard framework, the FCC cannot ignore the intramodal competition provided by CLECs that can and do compete without unbundling through self-provisioning or sharing facilities with others. The Commission must also consider that competitive local exchange carriers ("CLECs") and wireless providers are successfully competing using tariffed special-access products in many markets.

The Commission must also recognize that the primary goal of the 1996 Act is to advance facilities-based competition. As the Court put it, "the purpose of the [1996] Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC networks at the lowest price that government may lawfully mandate. Rather, its purpose is to stimulate competition-preferably genuine, facilities based competition."[25] Consequently, when CLECs are not impaired and can compete without UNEs, the FCC may not require unbundling.[26]

Absent a lawful impairment finding, the Act does not require ILECs to provide UNEs under section 251(c)(3). Under the statute, the FCC is required to make a lawful finding of impairment before unbundling can proceed. When the Commission is unable to justify continued unbundling, it should adopt a plan to end existing unbundling arrangements without any additional proceedings at the state level.

Those existing ILEC interconnection agreements that require provision of switching and high capacity lines were entered into pursuant to the FCC's unlawful unbundling rules. Having had its unbundling rules found wanting three times, it is now incumbent upon the Commission to

[25] *USTA II*, 359 F.3d at 576.
[26] Id. at 576-77.

undo the continuing effect of its unlawful orders and find that interconnection agreement provisions that implement the vacated rules do not require unbundling, unless the Commission finds impairment. A failure by the FCC to correct its unlawful findings "would be to give legal effect to the Commission's invalid order."[27]

The Commission must impose limiting standards to assess what network elements should be unbundled. The FCC has yet to adopt a definitive impairment test or to establish limiting standards for UNEs, as directed by the Supreme Court in *AT&T v. Iowa*.[28] USTA does not oppose the Commission quickly augmenting the competitive record to be used for further review of its UNE list, but applying an impairment analysis that fails to incorporate a meaningful limiting UNE standard is a futile exercise. Among other things, the FCC has not adequately taken into account alternatives to ILEC UNEs, and has not adequately considered factors such as cost, ubiquity and geographic markets. As previously applied by the FCC, these factors have not been considered by the FCC in the creation of lawful unbundling rules.

In making its unbundling determinations, substantial weight should be assigned to intermodal competition as a limiting factor. The FCC's own findings in recent reports on competition in the cable and wireless markets clearly demonstrate that facilities-based wireless and cable networks provide increasingly attractive alternatives to ILEC voice and data services. A rapidly growing number of customers are substituting wireless service, cable telephony and Internet telephony for traditional wireline local exchange service. Cable modem Internet access service is the market leader and surpasses DSL-based Internet access service by almost two to one. Cable operators have modernized their networks to offer cable modem services to 85% -

[27] *Williams v. Washington Metro. Area Transit Comm'n*, 415 F.2d 922, 943 (D.C. Cir. 1968) (en banc).

90% of their customers. These high-speed networks provide a platform for a wide array of VoIP providers. In addition, the major cable operators have all either implemented or announced plans to offer their own VoIP service to their customers. The existence of this intermodal competition should serve as a limiting factor on unbundling because unnecessary unbundling is itself anti-competitive. The greater the unbundling requirement imposed on ILECs, the greater the competitive disadvantage suffered by ILECs relative to their intermodal competitors. In fact, unbundling obligations can act as a deterrent to network upgrades and expansion.

USTA also opposes the FCC's past use of cost disparities between entrants and incumbents to justify maximum unbundling of network elements in its *UNE Remand Order*. Any consideration of cost by the FCC as a limiting standard must address the D.C. Circuit's direction that "cost comparisons of the sort made by the Commission, largely devoid of any interest in whether the cost characteristics of an 'element' render it at all unsuitable for competitive supply, seem unlikely either to achieve the balance called for . . . by the [Supreme] Court . . . in its disparagement of the of the Commission's readiness to find 'any' cost disparity reason enough to order unbundling."[29] Thus, cost disparities between entrants and incumbents do not justify unbundling.

In *USTA I*, the D.C. Circuit found the FCC's refusal to consider evidence of specific product and geographic markets "[o]f particular importance." USTA urges the FCC to develop an impairment analysis based on geographic-and product-level limiting standards applied on a granular basis to each network element on the current UNE list. Proper application of such an

[28] *Iowa Utils. Bd.*, 119 S.Ct at 734.
[29] *USTA I* at 34-35.

impairment analysis to the list of network elements currently unbundled will almost certainly severely truncate the number of and geographic scope of UNEs.

III. Extensive Competition Exists In The Switching Market And Competitors Are Not Impaired.

Because of the large number of switches deployed by competitors in local markets there simply is no rational basis upon which the FCC can require ILEC unbundling of switching. The FCC's finding in the *Triennial Review Order* that CLECs are impaired by the one-time start-up "hot cut" process in order to preserve UNE-P, was contrary to the evidence and therefore caused the Court to vacate the FCC's rules regarding mass market switching.[30] The Court of Appeals also reached several conclusions which the FCC must follow.

The Court vacated the FCC's provisional impairment finding based on hot cuts because: (1) the Commission itself suggested that this national finding was valid only insofar as the state proceedings created a potential safety valve;[31] (2) the Court "doubted" that the record supports a national impairment finding;[32] and (3) the FCC failed to consider narrowly tailored alternatives that did not impose all the costs associated with unbundling.[33] The Court again inquired as to whether competing providers are capable of competing without UNEs through possible competition, not whether a competitor is competing in the market.[34] The Court also reaffirmed "*USTA I's* holding that the Commission cannot ignore intermodal alternatives," and found that it "need not decide" whether the FCC has assigned appropriate weight to this factor because the

[30] *USTA II*, 359 F.3d at 568-71.
[31] *Id.* at 567-68.
[32] *Id.* at 587.
[33] *Id*. at 568-71.
[34] *Id*. at 575.

FCC's rules were vacated on other grounds.[35] Finally, the Court affirmed the FCC's determination that enterprise level switching and packet switching capabilities for hybrid loops should not be unbundled.[36]

There is voluminous evidence in this docket that competing providers are capable of entering and providing service without access to nationwide unbundled switching. Intermodal competition in the voice market is widespread; consumers have a large number of alternatives. Because cable modem service is available to 85-90 percent of the homes nationwide,[37] VoIP providers have access to the necessary infrastructure to provide voice services. Today, wireless service providers compete against wireline providers for customers all across the United States. In fact, ninety-seven percent of Americans live in an area where there are at least three wireless operators, and growing numbers of Americans have access to four, five, and six or more different wireless providers.[38] CLECs also use their own switches to provide local service in wire centers across the country that contain some 86 percent of Bell company access lines.[39] Because competition is not impaired without access to unbundled switching, there is no basis to require unbundling.

The competition for service is not limited to the urban areas. There are approximately 10,000 competitive circuit and packet voice switches that have been deployed in both small and large markets.[40] Cable companies, who have upgraded their networks to offer cable modem

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[35] *Id*. at 572-73.
[36] *Id.* at 570.
[37] *See* J. Bazinet, *et al*., JP Morgan, Broadband 2003, Fig. 9 (Dec. 5, 2002).
[38] FCC News Release, *FCC Adopts Annual Report on State of Competition in the Wireless Industry* (Sept. 9, 2004).
[39] *See* Triennial Review Order at ¶39.
[40] *See* New Paradigm Resources Group, Inc., *CLEC Report 2003*, Ch. 4 at Tables 14 & 19 (17th ed. 2003).

service, will be offering VOIP service in all areas of the country. In addition, this Commission has gone to extraordinary lengths to facilitate competitive entry in rural telecommunications markets by wireless providers. This has led to additional choice for consumers, which has resulted in a reduction in access minutes for rural local exchange carriers. Competition in rural markets is real, and for voice services it tends to come from providers that are free from many of the service obligations imposed on rural ILECs.

Further, because there is extensive competition for mass market switching, the facts do not support the continued use of the UNE Platform ("UNE-P"). The continued use of the UNE-P is no longer necessary given that there are over 10,000 competitive circuit and packet voice switches deployed in both small and large markets. No reasonable argument can be made that CLECs would be impaired by the removal of mass-market switching from the list of UNEs. Failure to remove mass-market switching and eliminate UNE-P would be legally unsustainable and critically impact facilities-based providers that offer local services. The ill-conceived use of UNE-P has contributed only to synthetic competition and should be ended.

The original intent of UNE-P was to create a bridge to facilities-based competition. That did not happen. Instead, some CLECs used UNE-P as a vehicle to acquire TELRIC-priced services under the guise of UNEs rather than pursuant to the resale provisions of the Act. These CLECs realized that in some markets, facilities-based ILECs could not compete with TELRIC-based resale. As such, resale became the long term business strategy for many CLECs. In the end, UNE-P discouraged CLECs from investing in facilities-based business strategies--not what the FCC envisioned when it embarked on this misconceived venture.

Moreover, the *USTA II* mandate makes clear that UNE-P is legally unsustainable. Because of the Court's mandate, CLECs are finally embracing truer forms of competition. For

instance, both AT&T and Z-Tel have changed their business strategies from reliance on UNE-P to VoIP.[41] Ironically the elimination of UNE-P will undoubtly lead to more facilities-based competition than the discredited UNE-P regime.

Finally, the hot-cuts process is adequate and scalable to handle the elimination of UNE-P, since CLECs are not impaired by the "hot-cut" process. In every state, via section 271 proceedings, the Commission has determined that the existing hot-cut process allows competitors to compete. In each case, the FCC relied on objective performance metrics that reflect the incumbent's aggregate hot-cut performance for all competitors, backed by performance assurance plans. The fact that in 271 proceedings this Commission found the ILEC hot-cut process fully adequate to demonstrate that markets were open to competitors should be binding here.

Moreover, the price of a hot-cut does not render the use of the CLEC switch uneconomical. The one time $51.00 approximate charge does not create impairment. As the D.C. Circuit explained, "cost disparities that are universal between new entrants and incumbents in any industry – are insufficient to establish impairment."[42] Entrants in many industries pay one-time customer acquisition costs; these costs are merely considered the price of doing business. Thus, the fact that hot-cuts are economical, coupled with the abundant 271 evidence that shows ILEC hot-cut performance to be exemplary, must lead the Commission to the inescapable conclusion that the current hot-cut process does not impair CLECs and that UNE-P is unnecessary.

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[41] *See* Z-Tel Form 8-K at 6; AT&T, News Release, *AT&T Proposes Roadmap to Facilities-Based Local Telecom Competition*, (April 29, 2004).
[42] *USTA I*, 290 F.3d at 427.

IV. Because High-Capacity Services Markets Are Highly Competitive UNEs Should Be Eliminated For High-Capacity Transport And Loops.

The FCC cannot adopt rules reinstating unbundling requirements for high-capacity services that have been invalidated three times by the federal courts. In *USTA II,* the D.C. Circuit again vacated rules requiring unbundling of high capacity facilities (such as DS1 and DS3 loops and transport). In vacating the FCC's decision again, the *USTA II* court reached three key conclusions regarding high-capacity facilities.

Initially, the Court criticized the FCC's decision to define individual routes as unique markets, instead requiring "a sensible definition of the markets in which deployment" occurs and that the FCC considers "facilities deployment along similar routes when assessing impairment."[43] The impairment determination must consider "similarly situated" routes where high-capacity facilities are deployed, and "competition on one route" is evidence that the FCC must consider "when assessing impairment" on other routes.[44]

Second, the Court reaffirmed *USTA I's* holding that the critical question is whether CLECs are capable of competing without UNEs in a particular market, whether or not any CLEC is already competing in that market.[45] Section 251(d)(2) of the Act focuses on the ability of a carrier to compete and makes clear that actual competition by a particular carrier is not the test. Hence, proof that a single competitor has deployed high-capacity facilities in a market is clearly sufficient to demonstrate that such a market is not "impaired."

[43] *USTA II*, 359 F.3d at 574.
[44] *Id*. at 575.
[45] *Id.; see USTA I*, 290 F.3d at 427.

Finally, the FCC "must consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired."[46] The *USTA II* court reasoned that when "competitors have access to necessary inputs at rates that allow competition not only to survive but flourish, it is hard to see any need for the Commission to impose the costs of mandatory unbundling."[47] In *Iowa Utilities Board*, the Supreme Court found that the impairment standard is not satisfied simply because unbundled access would allow competitors to reduce costs and earn higher profits.[48]

For the Commission to formulate a rational definition of high-capacity markets it must begin with the realization that these markets are characterized by a number of demand-and supply-side characteristics that make high-capacity services suited to competitive supply. The demand for high-capacity services is geographically concentrated, which provides opportunities for competitors.[49] In addition, demand for high-capacity services is concentrated with those customers that generate high volumes of traffic that would warrant high-capacity facilities and substantial revenue. Because of this, areas with demand for high-capacity services are heavily targeted by competing service providers entering into new markets. Finally, when a competitor enters a market for high-capacity services, it can provide these services throughout the geographic area. A competing carrier can provide high-capacity services via competitive facilities or special access services exclusively or in combination with an incumbent's facilities.

Under the framework for analysis prescribed by *USTA II*, it is clear that competing providers are capable of successfully providing high-capacity services to business customers

[46] *Id*. at 577.
[47] *Id*. at 576.
[48] *Iowa Utils. Bd.*, 525 U.S. at 390.
[49] *Triennial Review Order* at ¶¶ 205, 375.

without the use of UNEs. In fact, competition is occurring in high-capacity markets via a combination of competitors' own facilities or alternative facilities and special access services purchased from ILECs. There is compelling evidence that competing providers of high-capacity services are using alternatives to UNEs in large and small markets across the country. Through maps and analysis, Verizon and SBC have demonstrated in written ex parte submissions that "CLECs have widely deployed alternative fiber facilities (including fiber directly connecting to end-user premises) which they are using in combination with alternative facilities provided by other CLECs and ILEC special access services to successfully provide high capacity services to end users."[50]

A. There Is No Impairment For High-Capacity Transport.

In major metropolitan areas, where demand for high-capacity services is concentrated, competitive providers have deployed extensive fiber facilities to provide transport services. In the *Triennial Review Order*, the Commission acknowledged that competing providers "have deployed significant amounts of fiber transport facilities to serve local markets."[51] CLEC data confirms that competing providers have now deployed at least one network in at least 98 of the top 100 MSAs, and an average of roughly 20 networks in each of the top 50 MSAs.[52]

Competitive carriers are principally collocated in ILEC central offices. In the *Pricing Flexibility Order*,[53] the FCC, upheld by the D.C. Circuit, [54] endorsed fiber-based collocation as a

[50] SBC Ex Parte, CC Docket Nos. 01-338, 96-98, and 98-147 (August 18, 2004); *see also* Verizon Ex Parte, CC Docket Nos. 01-338, 96-98, and 98-147 (filed June 2004).
[51] *Triennial Review Order* at ¶ 370.
[52] *See generally* New Paradigm Resources Group's 2004 CLEC Report.
[53] 14 FCC Rcd 14221, ¶ 81 (1999).
[54] *WorldCom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

means to evaluate the presence of competitive transport. However, the FCC and the D.C. Circuit recognized that fiber-based collocation understates the true scope of competitive fiber transport, as it "fails to account for the presence of competitors that . . . have wholly bypassed incumbent LEC facilities."[55] On the basis of the collocation of facilities in ILEC central offices by facilities-based CLECs alone, however, the FCC concluded that, in many areas, special access service is competitive.

The ubiquity of alternative dedicated transport is also reflected in the growth of CLEC fiber networks. The FCC has recognized that "competitive LECs have deployed fiber that enables them to reach customers entirely over their own local loop facilities," and that they have "built fiber loops to buildings that carry a significant portion of the competitive traffic in certain MSAs."[56] Competing carriers can connect to CLEC fiber rings that are connected to IXCs, ISPs, ILEC central offices and commercial buildings--eliminating the need for CLECs to establish direct connections to every IXC POP or ILEC central office in order to provide service to a given location. Moreover, a number of wholesale providers have constructed fiber rings that bypass ILEC facilities in different markets, with the stated purpose of providing advanced fiber transport services, including interoffice transport, throughout the nation in all types of markets. Even where facilities have not been deployed, competitive carriers are not impaired in their ability to provide dedicated transport without access to ILEC dedicated transport facilities as a UNE.

Further, cost should not present an impairment issue. Because competitive carriers can concentrate their resources on wire centers that serve their customers, they are not required to replicate the entire ILEC interoffice network. Once the initial investment has been made to

[55] *WorldCom*, 238 F.3d at 462.
[56] *Triennial Review Order* at ¶ 298.

deploy fiber, the incremental cost to competitive carriers of deploying dedicated transport is extremely low, enabling CLECs to aggressively price their services. Thus, if ILECs are no longer required to provide dedicated transport as a UNE, timeliness and service quality are unlikely to create issues impairing a CLEC's ability to provide service.

B. There Is No Impairment For High-Capacity Loops.

Substantial numbers of alternative providers of high-capacity loops also exist. Without access to ILECs' high-capacity loops as UNEs, competitive carriers can, and do, provide high-capacity loops without any impairment in their ability to serve their customers. Moreover, wireless high-speed loops are an inexpensive alternative to provide business customers with high-capacity loops. The attractiveness of the fixed wireless industry has been increased by the finalization of the WiMax industry standard and the availability of high-speed, highly reliable equipment based on that standard. Competitive carriers can economically self-provision, or gain access to third-party suppliers of high capacity loops to provide service to their business customers. The quality of service and network reliability of competitive carriers providing high-capacity copper loops through self-provisioning or purchase from non-ILEC providers satisfies customer needs and expectations. In fact, fixed wireless high-capacity loops provide greater capacity than copper loops and a quality of service equal to standard copper loops. For all of these reasons, any finding of impairment for high-capacity loops could not survive legal scrutiny. Therefore, if high-capacity loops are not provided by ILECs as UNEs, there is no impairment under Section 251(d)(2).

C. The Availability Of Special Access Services Also Demonstrates The Lack Of Impairment.

Special access also is a viable alternative to unbundled high-capacity transport and loops. Competing carriers use special access services in three main respects: (1) to extend the reach of their own fiber networks or those of other alternative providers they may be using; (2) to compete entirely through a resale mode, by reselling special access services directly to end users; or (3) to transport switched traffic that is consolidated from smaller customers. Rather than UNEs, some carriers have even opted to use special access services exclusively. For instance, Time Warner stated that in "instances where we need services from ILECs to connect our remote customers to our vast fiber network, we purchase those under special access tariffs or under agreements with the ILECs."[57] Thus, the Commission must consider CLECs' use of special access for high-capacity services in its determination as to whether impairment exists. In the *Triennial Review Order*, the Commission concluded that the availability of special access services was "irrelevant to the impairment analysis."[58] The D.C. Circuit rejected the FCC's determination, emphasizing that the Commission must recognize competitors' ability to use special access purchased from incumbents and must infer that if competitors are operating in some markets that they could also operate in others with similar characteristics.[59]

The D.C. Circuit recognized that competitive providers can obtain high-capacity services either as UNEs or special access--the difference is one of price. The Commission must also

[57] Time Warner Telecom Press Release, *Time Warner Telecom Not Impacted by UNE Ruling* (June 10, 2004)(quoting Paul Jones, General Counsel and SVP Regulatory Policy, Time Warner telecom).
[58] *USTA II,* 359 F.3d at 576-77.

recognize that CLECs negotiate special access prices deeply discounted from the tariffed base rates for these services. For term commitments ranging from one to seven years, ILECs offer significant discounts to CLECs. Thus, as the D.C. Circuit emphasized, in such circumstances "competitors cannot generally be said to be impaired by having to purchase special access services from ILECs, rather than leasing the necessary facilities at UNE rates."[60]

It appears unlikely that any locations exist where CLECs are impaired without access to high cap loops and transport. Should the Commission disagree, however, it must limit those locations where impairment is found due to the availability of special access and CLEC use of special access to provision service. Under no circumstances may the Commission permit special access-to-UNE conversions because if a CLEC is using special access to serve a particular customer, that CLEC cannot be found to be impaired in its ability to serve that customer without UNEs.

V. The Geographic Market For Switching And High-Capacity Services Should At A Minimum Be An MSA.

The relevant geographic market for switching and high capacity services must be, at a minimum, an entire Metropolitan Statistical Area (MSA). *USTA II* requires the FCC to determine the market and adopt "a sensible definition of the markets in which deployment" occurs.[61] In another context, the Commission previously determined that an MSA would be the

[59] *Id.*
[60] *Id.* at 592.
[61] *Id.* at 574.

appropriate geographic market because "MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition."[62]

The fact that competing carriers may not have deployed services on every route within an MSA is irrelevant because the FCC "must consider the availability of tariffed ILEC special access services" and the "facilities deployment along similar routes when assessing impairment."[63] Consideration of both of these factors will allow the FCC to determine whether competing carriers are able to provide high-capacity services throughout the entire MSA. In addition, the competition from CLECs wireless, cable telephony and VoIP providers described above occurs on an MSA-wide basis, further buttressing the rationale for using MSAs as the appropriate geographic markets. Thus, the sensible definition of the geographic market is an MSA.

VI. The FCC Should Not Allow Competitors Unfettered Access To Enhanced Extended Links (EELs) For The Same Reasons That It Should Not Require Unbundling Of High-Capacity Transport And Loops.

EELs are not subject to unbundling, for the same reasons articulated above regarding high-capacity loops and transport. EELs are merely a combination of high-capacity loops and transport. Wherever alternative high-capacity loops and transport facilities exist, competing providers can substitute these services for EELs.

[62] *See Access Charge Reform*; *Price Cap Performance Review for Local Exchange Carriers*, Fifth Report and Order and Notice of proposed Rulemaking, 14 FCC Rcd 14221 ¶ 72 (1999).
[63] *Id* at 575, 577.

In *USTA II*, the court referenced and reaffirmed its ruling that the FCC could not ignore CLECs' use of tariffed special access services.[64] The Court found that where competing providers are successfully providing service using special access purchased from ILECs, the Act precludes a finding of impairment and access to such circuits as UNEs is not allowed. The Court recognized that it might create anomalies if CLECs that are competing successfully using special access were "barred from access to EELs as unbundled elements," while other carriers entering the market would not be barred.[65] Thus, the Court stated that "if history showed that lack of access to EELs had not impaired CLECs in the past, that would be evidence that similarly situated firms would be equally unimpaired going forward."[66]

Competing carriers are capable of providing high-capacity services without access to EELs as UNEs. Not only do competitors use special access, but the price of this service is irrelevant because "the purpose of the Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate."[67] The impairment standard does not require that unbundled access be furnished so that competitors may reduce their costs and earn higher profits.[68] Thus, EELs should not be subject to unbundling.

[64] *Id*. at 593.
[65] *Id*.
[66] *Id*.
[67] *Id*. at 576.

VII. State Unbundling Rules Are Preempted By The Act.

The Act precludes any state unbundling requirement that "thwarts or frustrates the federal regime . . .."[69] The FCC has made clear that:

> If a decision pursuant to state law were to require the unbundling of a network element for which the FCC has either found no impairment – and thus has found unbundling that element would conflict with the limits in Section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such a decision would fail to conflict with and 'substantially prevent' implementation of the federal regime, in violation of Section 251(d)(3)(C).[70]

In the absence of binding rules, the states cannot adopt whatever unbundling requirements they wish. Any unbundling requirement inconsistent with the Act imposed by a state would be preempted. If a state were to apply an impairment analysis contrary to the D.C. Circuit's holding, by assuming that "more unbundling is better," that state's action would be illegal.[71]

The Commission should explicitly state that its decision not to require unbundling under section 251 is binding national policy. Further, once the Commission has determined that CLECs are not impaired, there is no legitimate reason to impose unbundling requirements under section 271. State commissions have no authority to enforce section 271, and the Commission should make this clear to avoid uncertainty and confusion.

In addition, the FCC's rules should encourage commercial interconnection agreements, as the FCC advocated in March of 2004.[72] Commercial agreements can be fostered by the

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[68] *Iowa Ulils. Bd.*, 525 U.S. at 390.
[69] *Triennial Review Order*, at ¶ 192.
[70] *Id*. at ¶ 195.
[71] *USTA I*, 290 F.3d at 425.
[72] *See* Commission's letter of March 31, 2004 (stating that consumers would best be served if ILECs and CLECs engaged in good-faith negotiations to achieve commercially acceptable agreements).

Commission by making it clear that such agreements are outside the scope of section 252 of the Act and outside the scope of state authority to review and approve. A national policy is essential to competition and states must be precluded from advancing their individual political agendas through the perpetuation of unlawful unbundling and managed competition.

VIII. The FCC Should Create New Rules By Year End That Would Not Require A Transition Period.

The Commission must adhere to Chairman Powell's pronouncement that the Commission will vote on final unbundling rules in December 2004--to do any less would further flout the D.C. Circuit's mandate. The telecommunications industry needs expeditious action by the FCC to create legally sustainable permanent rules to end uncertainty and promote investment. The FCC must affirmatively move forward and meet the Chairman's deadline without unnecessary transitional rules.

The FCC already has essentially granted itself a stay that was denied to it by the D.C. Circuit and the Supreme Court by issuing interim rules for a six month period, freezing in place the rules the D.C. Circuit found unlawful.[73] In addition, the FCC has proposed a further and unwarranted six-month transition period following the interim period. Like the interim rules, the proposed transitional rules would require the continuance of unlawful unbundling of switching, dedicated transport, and enterprise market loops the same nationwide unbundling requirements that the D.C. Circuit invalidated in *USTA II*. The proposed rules do not "protect incumbent

[73] *See United States Telecom Ass'n v. FCC*, Petition for a Writ of Mandamus to Enforce the Mandate of this Court, Nos. 00-1012, (filed in the D.C. Circuit on August 23, 2004) (Writ of Mandamus).

LECs' interests," as the FCC claims.[74] In fact, the FCC's proposed transition rules would "require ILECs to continue providing unbundled mass-market switching and high-capacity facilities for then existing CLEC customers for yet *another* six months – that is, perhaps as late as September 2005, or nearly two years after the establishment of those unlawful rules in the *Triennial Review Order* (not to mention nine years after those unlawful rules were first established)."[75]

Moreover, the FCC proposes to allow only a limited price increase during the transition period: one dollar per month for switching and 15% more for high-capacity facilities. In addition, the proposed transition rules do not guarantee ILECs the right to discontinue providing these UNEs at the end of the period. "Instead the incumbents must rely on 'applicable state commission[] processes' and thus are at the mercy of state commissions – 'a more favorable venue for preserving . . . aggressive unbundling rights' – to interpret the terms of 'each incumbent LEC's interconnection agreements."[76] To prevent this result, the FCC should affirmatively state that its new rules are effective immediately, which would prevent states from continuing to require unlawful UNEs at TELRIC rates.

CONCLUSION

Certainty for the future of telecommunications carriers depends on the FCC's ability to create permanent rules in accordance with the D.C. Circuit's mandate in *USTA II*. After eight years of uncertainty, the time is now for the Commission to establish legally sustainable

[74] NPRM at ¶29.
[75] Writ of Mandamus at 7.
[76] *See Id*. (citing *Triennial Review Order*, Separate Statement of Chairman Michael K. Powell Approving in art and Dissenting in Part at 3, 18 FCC Rcd at 17506).

unbundling rules. The FCC's impairment framework must address intermodal as well as intramodal competition and utilize geographic-and product-level limiting standards. Competitive providers can now rely on their own or alternative facilities to provide switching and high-capacity services, and are also extending their ability to provide high-capacity facilities by using special access services purchased from ILECs. To further provide certainty, the Commission should not impose transition rules, but rather should create permanent rules that are effective immediately. This would eliminate any need for transitional rules, which can only further delay implementation of the mandate and further the unlawful requirement that ILECs provide facilities at below market prices. For the forgoing reasons, the Commission should create permanent rules consistent with the comments expressed herein.

Respectfully submitted,

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